RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2803-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HIRAM A. CELESTINE, a/k/a LEROY JOHNSON, LEROY A. JOHNSON, ANDRE FOSTER, ANDRE JOHNSON, ANDRE JONES, DIAMOND SIMS, ANDRE JOYNER, HIRAM CELSTINE, HIREN CELESTINE, CURTIS L. BEATON and ANDY JOHNSON,

Defendant-Appellant.

Submitted May 2, 2017 – Decided May 8, 2017

Before Judges Yannotti, Fasciale and Sapp-Peterson.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Indictment No. 13-03-1025.

Joseph E. Krakora, Public Defender, attorney for appellant (Anderson D. Harkov, Designated Counsel, on the brief).

Mary Eva Colalillo, Camden County Prosecutor, attorney for respondent (Nancy P. Scharff, Assistant Prosecutor, of counsel and on the briefs).

Appellant filed pro se supplemental briefs.

PER CURIAM

Defendant appeals from his convictions for four counts of second-degree sexual assault, N.J.S.A. 2C:14-2(c)(4); fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b); second-degree attempted sexual assault, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:14-2(c)(1); second-degree sexual assault, N.J.S.A. 2C:14-2(c)(1); fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a); third-degree tampering with a witness, N.J.S.A. 2C:28-5(a); and the disorderly persons offense of harassment, N.J.S.A. 2C:33-4(b). We affirm.

We discern the following facts from the evidence adduced at trial. In the summer of 2010, defendant moved to Camden County to work at a packing company. Defendant rented a room at a motel and worked six days per week. Defendant met A.K. and her twin sister (the twin sister), who were fifteen-years-old and living at the motel with their mother and stepfather.[1] Defendant was thirty-four-years-old at the time.

A.K. testified she began a sexual relationship with defendant in August 2010. A.K.'s twin sister testified that the relationship began at the motel as well. Defendant testified he was only friends with A.K. and the twin sister while living at the motel and that he did not start a sexual relationship with A.K. until

[1] The twins were born in 1995.

after they both had moved out of the motel and she was sixteen-years-old.

In September 2010, defendant had a dispute with the motel management and was asked to leave. Defendant was able to continue staying at the motel by paying a fee to his friend and staying in the friend's room. Defendant testified that he would buy the twins' mother drugs when he bought his own, but that he promised A.K. he would not buy them for her mother anymore. A.K. testified the sexual relationship continued in the friend's room. A.K. testified that her twin sister knew about the relationship but that her parents did not.

In November 2010, A.K. and her family moved out of the motel and into a family member's house. Defendant stayed in contact with A.K. and her family. Defendant moved out of the area but testified he tried to visit A.K. every two weeks from July 2011 to July 2012. A.K. testified defendant started visiting her earlier, in November 2010, and they would have sex in a park and in a hotel.

In January 2011, defendant bought A.K. a phone for her sixteenth birthday and they met at a hotel. A.K. testified that she ended the relationship in the summer of 2012 because she found someone else. Defendant testified he was the one who ended the

relationship because he could not afford to visit her anymore. The two continued to speak on the phone.

In August 2012, A.K. had an abortion and defendant accompanied her to the appointment. In September 2012, A.K. agreed to go to a hotel with defendant to see him "one last time." A.K. testified that defendant had told her that he would give her supplies and money for school. A.K. testified that defendant took off his pants in the hotel room and she told him she did not want to have sex with him. She testified that defendant became angry that he "wasted [his] money" on the hotel room. A.K. testified he then forcibly raped her. She testified that she tried to move her arms and kick him, she repeatedly asked him to stop, and she was crying.

A.K. took a shower because she "didn't want to smell like him" and went home and told the twin sister what happened. The twin sister wanted to tell their mother but A.K. advised against that. The twin sister and A.K.'s mother testified they saw bruises on A.K.'s legs. A.K. testified that defendant continued to call her and "wanted to apologize and . . . make things right with what he did." Defendant testified that he never met A.K. in a hotel in September 2012.

On September 20, 2012, A.K. agreed to meet defendant at the Camden transportation center because she was afraid he knew her address and could harm her family. A.K. testified that defendant

became aggressive and she began to cry. A nearby officer approached A.K. and defendant and noted A.K. was fearful and crying. Defendant told the officer A.K. was a family friend, she was pregnant, and he was trying to help her. The officer decided to arrest defendant, defendant ran from the officer, and the officer chased and subdued him with help from others.

Approximately five days after defendant's arrest on September 20, 2012, defendant sent A.K. a postcard apologizing to her and asking her to "please drop the charges" or else he "will be here for a very long time." Defendant then sent A.K. another letter stating he was "truly sorry" and his actions were "unacceptable."

On March 27, 2013, a Camden County Grand Jury indicted defendant for four counts of second-degree sexual assault, N.J.S.A. 2C:14-2(c)(4) (Counts One, Two, Three, and Five); fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b) (Count Four); second-degree attempted sexual assault, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:14-2(c)(1) (Count Six); first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(6) (Count Seven); third-degree terroristic threats, N.J.S.A. 2C:12-3(a) and (b) (Count Eight); fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a) (Count Nine); and third-degree tampering with a witness, N.J.S.A. 2C:28-5(a) (Count Ten).

On January 30, 2014, the court held a hearing on defendant's motion to dismiss Counts One through Seven of the indictment. The court denied the motion as to Counts One through Six; it denied the motion as to Count Seven, without prejudice, instructing the State to provide defense counsel with "specifics concerning dates and times." On July 21, 2014, the State amended Count Seven from first-degree aggravated sexual assault "[o]n a date between August 1, 2012 and September 19, 2012," to second-degree sexual assault "on a date in September 2012 but before September 20, 2012."

On July 22 to July 31, 2014, defendant was tried before a jury. On July 31, 2014, the jury found defendant guilty of the charges in the indictment, with the exception of a conviction on the lesser-included offense of harassment on Count Eight.

The judge granted the State's motion to impose an extended term pursuant to N.J.S.A. 2C:44-3(a), based on defendant's status as a persistent offender. On December 5, 2014, the court sentenced defendant to an aggregate of thirty-nine years' imprisonment, with twenty-five years' parole ineligibility pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2(a).

On appeal, defendant argues:

> POINT ONE
> THE TRIAL COURT ABUSED ITS DISCRETION, AND VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW, WHEN IT ALLOWED THE STATE TO CHARGE DEFENDANT IN COUNT

SEVEN WITH A CRIME THAT TOOK PLACE ON A SINGLE OCCASION SOMETIME DURING A TWENTY[-]DAY PERIOD.[2]

POINT TWO

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT PROHIBITED DEFENSE COUNSEL FROM ESTABLISHING DURING CROSS EXAMINATION OF [A.K.'S MOTHER] THAT SHE AND HER DAUGHTERS WERE BIASED AND MOTIVATED TO TESTIFY AGAINST DEFENDANT BECAUSE DEFENDANT HAD FUELED HER DRUG USE BY PURCHASING ILLEGAL DRUGS FOR HER, THUS DEPRIVING DEFENDANT OF HIS CONSTITUTIONAL RIGHTS TO CONFRONT THE WITNESSES AGAINST HIM AND TO A FAIR TRIAL.

POINT THREE

THE COURT ERRED BY GIVING AN UNNECESSARY FLIGHT CHARGE THAT WAS VAGUE AND UNFOCUSED, ALLOWED THE JURY TO APPLY IT TO ALL THE CHARGES, AND SHOULD NOT HAVE BEEN GIVEN AT ALL BECAUSE IT ALLOWED THE JURY TO INFER DEFENDANT'S GUILT ON ALL THE CHARGES IF IT FOUND DEFENDANT GUILTY OF RESISTING ARREST BY FLIGHT, AS CHARGED IN COUNT NINE.

POINT FOUR

THE INCORPORATION OF FORTY[-]SIX PAGES OF POLICE REPORTS AND WITNESS STATEMENTS IN DEFENDANT'S PRESENTENCE REPORT, THAT WERE NOT PART OF THE EVIDENCE IN THIS CASE, WITHOUT DEFENDANT'S CONSENT, VIOLATED DEFENDANT'S RIGHT TO TRIAL BY JURY AND STATE V. NATALE, AND REQUIRES A REMAND FOR A NEW SENTENCE HEARING. (NOT RAISED BELOW).

POINT FIVE

THE SENTENCING COURT VIOLATED THE PARAMETERS OF STATE V. YARBOUGH WHEN IT RELIED ON THE SAME AGGRAVATING FACTORS TO IMPOSE FIVE CONSECUTIVE SENTENCES, SIX DISCRETIONARY PAROLE DISQUALIFIERS, AND EIGHT SENTENCES

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[2] Defendant argues the same point in his pro se letter brief.

GREATER THAN THE MID-RANGE, FOR CRIMES THAT HAD THE SAME OBJECTIVE AND THE SAME VICTIM.

Defendant also argues in his pro se letter brief that the State failed to prove all the elements of Count Ten, witness tampering, because he claims he did not know of an investigation when he sent A.K. letters asking her to "drop the charges."

We begin by addressing defendant's first argument, that his constitutional rights were violated because Count Seven did not have a particular date but rather stated the offense occurred sometime between September 1 and 19, 2012.

"[T]he decision whether to dismiss an indictment lies within the discretion of the trial court and that exercise of discretionary authority ordinarily will not be disturbed on appeal unless it has been clearly abused." State v. Hogan, 144 N.J. 216, 229 (1996) (citations omitted). Furthermore, an "indictment must charge the defendant with the commission of a crime in reasonably understandable language setting forth all of the critical facts and each of the essential elements which constitute the offense alleged." State v. Franklin, 184 N.J. 516, 534 (2005) (quoting State v. Wein, 80 N.J. 491, 497 (1979)). However, "a young victim will not have to be as exacting when specifying dates of abuse." State v. C.H., 264 N.J. Super. 112, 125 (App. Div.), certif. denied, 134 N.J. 479 (1993).

Here, A.K. was fifteen-years-old when her sexual relationship began with defendant. Although she was seventeen-years-old and could not remember the exact date in September 2012 when defendant forcibly raped her, defendant testified he had records indicating that he worked every day except for two days in the relevant period. Given the distance he traveled to visit A.K., the rape would have had to happen on one of the two days he was not working. Defendant's defense was that he never met A.K. in a hotel in September 2012. He had enough information to develop a defense as to the two days he was not working in the period. The charge was sufficiently specific to give defendant notice of all the critical facts and essential elements of the charge. There was sufficient notice and detail for defendant to prepare a defense. Moreover, the fact that A.K. could not further pinpoint the timeframe went to the weight the jury accorded her testimony, not to whether the count should have been dismissed.

Defendant next argues for the first time on appeal that he should have been able to cross-examine A.K.'s mother about her drug use in order to show bias. We note that review of a trial court's evidentiary rulings are "subject to limited appellate scrutiny." State v. Buckley, 216 N.J. 249, 260 (2013) (quoting State v. Buda, 195 N.J. 278, 294 (2008)). "We afford considerable deference to a trial court's findings based on the testimony of

witnesses." Ibid. This court will not reverse a trial court's evidentiary ruling absent an abuse of discretion. Buda, supra, 195 N.J. at 294. The judge sustained the State's objection to the line of questioning about A.K.'s mother's drug use. The judge found that the line of questioning was not relevant and that it was beyond the scope of direct examination. Also, defendant testified that he had purchased drugs for A.K.'s mother, and defense counsel addressed A.K.'s mother's credibility in summation. The judge did not abuse his discretion by not allowing the cross-examination about the mother's drug use.

We reject defendant's contention that the flight charge was not sufficiently focused on the terroristic threats. Our Supreme Court has consistently emphasized "clear and correct jury instructions are essential for a fair trial." State v. Nelson, 173 N.J. 417, 446 (2002) (quoting State v. Koskovich, 168 N.J. 448, 507 (2001)). "A charge is a road map to guide the jury, and without an appropriate charge a jury can take a wrong turn in its deliberations." State v. Martin, 119 N.J. 2, 15 (1990). Indeed, "[s]o critical is the need for accuracy that erroneous instructions on material points are presumed to be reversible error." Ibid. "The appropriate time to object to a jury charge is 'before the jury retires to consider its verdict.'" State v. Funderburg, 225 N.J. 66, 79 (2016) (quoting R. 1:7-2). Because this issue was not

raised below, we review using the plain error standard. R. 2:10-2. Defense counsel's failure to object to the court's final charge demonstrates that, at the time, counsel "perceived no prejudice in the charge given." State v. Mays, 321 N.J. Super. 619, 630 (App. Div.), certif. denied, 162 N.J. 132 (1999).

Here, defense counsel requested the charge and the State specifically stated that it had no objection to the flight charge applying to the terroristic threats charge. Accordingly, the judge indicated to the jury that it should reach the flight question only if it found defendant was guilty of terroristic threats and resisting arrest. Specifically, the judge stated, "[t]here has been some testimony in the case from which you may infer that the defendant fled shortly after the alleged commission of the crime of terroristic threats . . . . The question of whether the defendant fled and the commission of the crime is another question of fact for your determination." This jury charge was appropriate.

Defendant next argues that the judge improperly considered information in the presentence report. "The court shall not impose sentence without first ordering a presentence report investigation of the defendant and according due consideration to a written report of such investigation." State v. Randolph, 210 N.J. 330, 346 (2012) (quoting N.J.S.A. 2C:44-6(a)). The presentence report

"includes individualized information pertaining to a defendant's criminal, psychiatric, employment, personal, and family history." Ibid. (citing N.J.S.A. 2C:44-6(b)). Defendant argues that the presentence report included information such as police reports that should not have been considered. However, defendant does not point to any specific fact or statement in the presentence report that could have prejudiced his sentencing. Defense counsel reviewed the presentence report and only addressed a ministerial issue as to a date at the sentencing hearing. The judge had the discretion to consider the information in the presentence report and properly did so.

Finally, defendant argues the court improperly imposed an excessive sentence and violated State v. Yarbough, 100 N.J. 627, 644 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986). This court reviews sentencing determinations deferentially. Succinctly,

> [a]ppellate review of sentencing is a three-step process requiring the reviewing court to determine (1) whether the legislatively fixed sentencing guidelines were followed, (2) whether the aggravating factors and mitigating factors found by the trial court were based upon competent, credible evidence in the record and (3) whether application of the guidelines to the facts of the case makes the sentence clearly unreasonable so as to shock the judicial conscience. On review, an appellate court should not substitute its judgment for that of the trial court. The

> test is not whether a reviewing court would have reached a different conclusion on what an appropriate sentence should be; it is rather whether, on the basis of the evidence, no reasonable sentencing court could have imposed the sentence under review.
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> [State v. Burton, 309 N.J. Super. 280, 290 (App. Div.) (citations omitted), certif. denied, 156 N.J. 407 (1998).]

N.J.S.A. 2C:44-5(a) states "[w]hen multiple sentences of imprisonment are imposed on a defendant for more than one offense, . . . such multiple sentences shall run concurrently or consecutively as the court determines at the time of sentence[.]" Our Supreme Court has set forth "general sentencing guidelines for concurrent or consecutive-sentencing decisions (including any parole ineligibility feature) when sentence is pronounced on one occasion on an offender who has engaged in a pattern of behavior constituting a series of separate offenses or committed multiple offenses in separate, unrelated episodes." Yarbough, supra, 100 N.J. at 644. These criteria are:

> (1) there can be no free crimes in a system for which the punishment shall fit the crime;
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> (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
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> (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:

> (a) the crimes and their objectives were predominantly independent of each other;
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> (b) the crimes involved separate acts of violence or threats of violence;
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> (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
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> (d) any of the crimes involved multiple victims;
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> (e) the convictions for which the sentences are to be imposed are numerous;
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> (4) there should be no double counting of aggravating factors; [and]
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> (5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense[.]
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> [Id. at 643-44.]

Here, the judge carefully considered the Yarbough criteria in determining defendant's sentence. The judge stated, "I have not double[-]counted any of the aggravating factors. I've considered the factors separately in imposing this sentence and I think the successive terms that I have imposed are appropriate under factor [five] on the [Yarbough] factors." The judge found aggravating factors three, the risk that defendant will commit another crime, N.J.S.A. 2C:44-1(a)(3); six, the extent of defendant's prior criminal record and the seriousness of the

offenses, N.J.S.A. 2C:44-1(a)(6); eight, defendant committed an offense against a police officer, N.J.S.A. 2C:44-1(a)(8); and nine, the need for deterrence, N.J.S.A. 2C:44-1(a)(9). He found no mitigating factors. The judge properly found defendant was a persistent offender. Given this court's deferential standard of review, the sentence is appropriate.

The defendant's pro se argument that the State failed to prove all the elements of Count Ten, witness tampering, because he claims he did not know of an investigation when he sent A.K. letters asking her to "drop the charges" is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.